

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH P. FRANKENBERRY,)	
Petitioner)	
)	
vs.)	Civil Action No. 09-557
)	Judge Nora Barry Fischer/
BRIAN COLEMAN, Superintendent SCI)	Chief Magistrate Judge Amy Reynolds Hay
Fayette; COURT OF COMMON PLEAS)	
OF FAYETTE COUNTY, PA,)	
Respondents)	

MEMORANDUM ORDER

The above-captioned habeas petition, ostensibly filed pursuant to 28 U.S.C. § 2241, was received by the Clerk of Court on May 7, 2009, and was eventually referred to Chief United States Magistrate Judge Amy Reynolds Hay for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rules 72.C & D of the Local Civil Rules.

Pursuant to Rule 4 of the Rules Governing Habeas Petitions, Chief Magistrate Judge Hay issued a Report on October 8, 2009, recommending pre-service dismissal of the petition as being jurisdictionally improper or, in the alternative, as being meritless. Dkt. [8]. The Report was served upon Petitioner, who filed objections. Dkt. [12]. Those objections do not merit much comment other than the following. Petitioner expends much time on contending that the instant petition which he himself characterized as being brought pursuant to Section 2241 is really a Section 2254 and not a second or successive Section 2254 petition. If it is not a second or successive Section 2254, then query why did Petitioner style the present petition as being filed pursuant to Section 2241, when he himself now belatedly claims it is really a properly filed first Section 2254 petition given his argument that none of the previous habeas petitions he filed can

qualify as a first Section 2254 petition, an argument which he did not make in his initial filings in this Court and an argument he did not apparently make until after the Report was filed. In any event, such an objection fails to convince the Court that this is not really a second or successive Section 2254 petition. However, even if it were not a second or successive Section 2254 petition, the Report addressed the claims of Petitioner on the merits in an alternative basis for dismissal. Hence, even if this is not a second or successive Section 2254 petition, and it could properly be considered on the merits by this Court, it was, in fact, considered on the merits in the Report and rejected as meritless. Petitioner's objections do not persuade us that the Report was wrong in finding that his claims are meritless.

After *de novo* review of the pleadings and the documents in the case, together with the Report and Recommendation, and the Petitioner's various objections to the Report, the following order is entered:

AND NOW, this 6th day of November 2009;

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus ostensibly filed pursuant to Section 2241 is **DENIED**.

IT IS FURTHER ORDERED that, to the extent one is needed, a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Report and Recommendation (Dkt. [8]) of Chief Magistrate Judge Hay, filed October 8, 2009, is adopted as the opinion of the court, as supplemented by this memorandum order.

Nora Barry Fischer
The Honorable Nora Barry Fischer
United States District Court Judge

cc: The Honorable Amy Reynolds Hay
Chief United States Magistrate Judge

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